SEP 27

In the Supreme Court of the United States

OCTOBER TERM, 19[illegible]

No. 576

CULLEN HUCKABY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

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Petitioner, Cullen Huckaby, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered September 17, 1968, dismissing Appeal No. 18,759 from the judgment entered by the United States District Court for the Eastern District of Michigan, Southern Division, on March 18, 1968.

OPINIONS.

The District Judge rendered an oral unreported opinion which is set forth in Appendix A, *infra*. The opinion of the Court of Appeals for the Sixth Circuit is set forth in Appendix B, *infra*.

JURISDICTION.

The judgment of the Court of Appeals was entered on September 17, 1968 (Appendix C, *infra*). This Petition was filed on September 27th, 1968. The Court of Appeals has stayed its mandate until the Petition for Certiorari, No. 394, will have been finally determined.

The jurisdiction of the Court is invoked under 28 U.S.C., § 1254(1).

QUESTIONS PRESENTED.

1. Whether the District Judge at the hearing of petitioner's Motion for a New Trial on the Grounds of Newly Discovered Evidence committed an abuse of discretion when he announced, shortly after taking of testimony had commenced:

> "We are not going to try this case twice. And that is my ruling." (JA[1] p. 15.)

2. Whether the Trial Judge abused his discretion in denying petitioner's Motion for a New Trial on the Grounds of Newly Discovered Evidence.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED.

Rule 33 of the Federal Rules of Criminal Procedure (Appendix D, *infra*). The following appear in the appendix to the Petition for a Writ of Certiorari, No. 394: 26 U.S.C., sections 5179(a)(1), 5205(a)(2), 5222(a)(1), 5601(a)(1) and (7), 5604(a)(1) and 5681(c). Section 605 of the Communications Act of 1934. The Fourth, Fifth and Sixth Amendments to the Constitution of the United States.

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[1] The reference "JA" is to the printed joint appendix below in Appeal No. 18,759.

STATEMENT.

Petitioner was convicted on his plea of not guilty by a jury under the sections of Title 26, *supra*, of the offense of possession of a still, mash and distilled spirits and the offense of working in a distillery.

At the trial, agents testified that, standing on the sidewalk, they smelled odors of fermenting mash emanating from petitioner's home, i.e., on November 6, 1964, at approximately 8:20, P.M. (RA 3b), November 6, 1964, at 10:25 P.M. (RA 3b), November 8, 1964, at 8:00 P.M. (RA 17b).[2] At the times the agents claimed to have smelled such odors, the wind was blowing from them towards petitioner's home which is in the same northern area of Detroit as the Detroit City Airport Observatory where the direction and velocity of the winds were taken (Appendix E, *infra*).

Petitioner's home is located on the north side of Josephine Street which runs in a west-southwest direction (JA 19a, Exhibit D.)[3]

However, irrespective of the direction of the winds, the so-called "mash" was composed of sugar, water and yeast[4] which gives off so little odor that it probably would not be discernible outside the room in which the vats were located, certainly not outside the house (JA 13a-17a).

The testimony of the agents is clearly proven to be false for two reasons, i.e., the direction of the wind and

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[2] The reference "RA" is to the printed Appendix of Respondent in Appeal No. 17802.

[3] Plat of Josephine Street showing petitioner's home—received in evidence as Defendant's Exhibit D and lodged with this Court.

[4] Page 39b of the Government's printed Appendix in Appeal No. 17802, pp. 144, 161, 164 of the trial transcript in case No. 394.

the lack of odor from the mash, either one of which is adequate to establish the falsity of the agents' testimony.

The false testimony of the agents has two facets. As set forth in Petition for Certiorari, No. 394, the false testimony, together with the testimony of Levett,[5] the electronics expert, leads inescapably to the conclusion that electronic surveillance was the means employed for the discovery of the offense, and, further, upon eliminating such false testimony, there is no evidence to sustain the conviction.

In the case at bar, the false testimony constitutes newly discovered evidence which is grounds for a new trial and which the agents felt secure in giving because they were fortified with information received from the electronic surveillance.

REASONS FOR GRANTING THE WRIT.

1. The Trial Judge committed an abuse of discretion when he announced, shortly after the taking of testimony had commenced: "We are not going to try this case twice. And that is my ruling."

Such a statement clearly establishes that the Trial Judge had decided to deny petitioner's Motion for a New Trial on the Grounds of Newly Discovered Evidence before he had heard the greater part of the testimony in support of the motion. He had already made up his mind when he said, "We are not going to try this case twice," and then he authenticated his opinion with "And that is my ruling."

This is clearly a case of prejudgment. In *Knapp v. Kinsey* (C.A. 6th, 1956), 232 F. 2d 458, cert. den. 352 U.S. 892, Miller, Circuit Judge, speaking for the court, said on page 465:

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[5] JA 27a-30a.

"One of the fundamental rights under our judicial system is that he is entitled to a fair trial in a fair tribunal, and that fairness requires an absence of actual bias or prejudice in the trial of the case."

In *Moskun v. United States* (C.C.A., 6th Cir., 1944), 143 F. 2d 129, the Circuit Court reversed the trial court and remanded the case for retrial by another Judge. The first Judge had given an exhibition of prejudice.

The statement of the Trial Judge is a conclusive demonstration of prejudgment and absolute proof that petitioner did not receive a fair trial to which he was entitled.

2. The Trial Judge abused his discretion in denying petitioner's Motion for a New Trial on the Grounds of Newly Discovered Evidence.

Not only did the Trial Judge deprive petitioner of his right to a fair trial by prejudging the evidence before he had heard it, additionally he committed an abuse of discretion by denying petitioner's motion. Rule 33, Federal Rules of Criminal Procedure. (Appendix D, *infra.*) *U. S. v. Lewis* (C.A., 6th Cir., 1964), 338 F. 2d 137.

False testimony of a material witness constitutes newly discovered evidence. *Larrison v. U. S.* (CCA, 7th Cir., 1928), 24 F. 2d 82.

In *Mesarosh v. U. S.* (1956), 352 U. S. 1, the court held that the conviction of appellant was tainted by false testimony and said on page 9:

"The dignity of the United States Government will not permit the conviction of any person on tainted testimony."

False beyond measure was the testimony of the agents that they could smell the odor of mash emanating from petitioner's home when (1) the wind was blowing in the

wrong direction and (2) the composition of the mash was such that no discernible odor was given off.

The Trial Judge in his oral opinion (App. A, *infra*) ignored completely the fact that there was no discernible odor for the agents to smell. He confined himself to speculating about changes in the winds for which there was no evidence whatever.

The opinion of the Court of Appeals (App. B, *infra*) also avoids facing the fact of the composition of the "mash" and relies on the Trial Judge's speculation about the winds.[6]

Not one word of testimony, not one piece of evidence was introduced by the Government to rebut in any degree whatever the report of the United States Weather Bureau (Appendix E, *infra*) or the testimony of Dr. Hooper that a "mash" of sugar, water and yeast gives off no discernible odor (JA 16a).

In order that it be the grounds for a new trial, the false testimony must be material. The clear test of that in the case at bar is that, when the false testimony is disregarded, there is no evidence remaining, except an inference on an inference—that, at night, a man was identified as petitioner by reason of a multicolored sweater worn by the man, when it was never established that petitioner ever wore the sweater. (Tr. pp. 8, 17, 32, 50, 78.)[7]

From the foregoing, the Trial Judge should have been reasonably well satisfied that, without the false testimony, the jury would have reached a different verdict.

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[6] The Government has also consistently ignored the lack of odor of the mash. Its memorandum in opposition to Petition No. 394 avoids entirely these facts.

[7] The reference "Tr" is to the trial transcript filed in case No. 394.

The affidavit of the brother of petitioner (JA 31a-34a-35a) accepted as evidence in lieu of his testimony, fully explains all that had happened. The wire tap disclosed the offense and led to the unlawful search undertaken to verify information obtained from the tap. The affidavit for a search warrant based on the claim that the agents smelled the odor of mash emanating from petitioner's home was necessary—for certainly the grounds could not be based on the unlawful search. To the agents, there was no problem about the affidavit because they knew from information obtained from the unlawful search that there was a still in the attic. As to the winds or the odors, they did not give a thought. In all probability, they were not even at the scene. If they had been, they would have noticed the direction of the wind.

When arrested, petitioner disclaimed all knowledge and said responsibility for the still was his brother's. Yet, the brother was not arrested. He was not even questioned.

At the trial, the brother testified that he was responsible for the still. Again, he was not investigated—nor was he prosecuted—neither for the still—nor for his testimony, if the same had been false.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari should be granted.

JAMES EASLY,
Counsel for Petitioner.

APPENDIX A.

Oral Opinion of District Court.

The Court: Well, gentlemen, the motion for new trial on the grounds of newly discovered evidence is a misnomer. There is no newly discovered evidence here.

As a matter of fact, there is very little that even qualifies as evidence. Certainly the testimony of the expert witness is far from persuasive; the fact that there were certain wind currents out at the airport at a certain time of course doesn't mean that there could not have been variations in this area, local, transient. As a matter of fact, the witness wouldn't say that there couldn't be, obviously since he was sworn to tell the truth.

The whole point about what the wind was a couple of years later, and his substance he put on the porch is completely unpersuasive. We don't know anything about the conditions that existed at the time that this search warrant was made out other than the agents say they smelled it, and I find them not impeached in any way.

Certainly there is nothing newly discovered here.

The testimony about the wire tap is equally fantastic. To argue from the fact that there was a wire tap at this house at some recent time that there was a couple of years before, based in turn upon the testimony about the wind here, is getting into the realm of fantasy.

There is no evidence of any kind that would warrant a holding that there had been anything improper here in this case.

The agents have testified they didn't get into the house.

And the test of the matter here, the thing in the affidavit of Huckaby, in the light of what has transpired here, the agents' testimony, it is inherently incredible. He has

an agent saying, "I see you have a still in operation upstairs. It doesn't appear to be yours."

Well, the affidavit itself is contradictory with the sworn testimony at the trial in important particulars. Even if the testimony about the wind were relevant, it is not persuasive and it certainly is not newly discovered.

However, the court heard this without a jury and I am going to let it stand. But I will tell you frankly, gentlemen, that it is about the least persuasive of anything I have ever heard on this bench.

The idea that a man can go out there years later and testify what the wind was back in October and November, years prior thereto, is ridiculous. The testimony doesn't sustain the position you have taken. This Doctor can't testify what the wind conditions were at that time. And if you observe his testimony carefully you will see that he doesn't.

This thing about the agent threatening to kill this man, and so forth, and $15 passing back and forth—there is nothing to sustain all this.

And I can't help but observe, gentlemen, that we hear a lot these days about law and order and observing lawful authority. You know, we travel on a two-way street. Yes, of course the agents and the government are going to have to observe law and order. There are certain requirements that are placed upon our citizens.

Now, this man has been found guilty by a jury after a fair trial conducted by distinguished counsel who was alert, zealous, and impressive in his behalf.

The motion is denied.

APPENDIX B.

Opinion of the United States Court of Appeals for the Sixth Circuit.

(Decided September 17, 1968.)

Before: O'SULLIVAN, PHILLIPS and CELEBREZZE, Circuit Judges.

PER CURIAM. On July 15, 1968, an unpublished order in case No. 17,802 was entered affirming the conviction of appellant for the offense of possession of a still, mash and distilled spirits and working in a distillery in violation of 26 U.S.C. §§ 5179(a) (1), 5205 (a) (2), 5222 (a) (1), 5601 (a) (1), 5601 (a) (7), 5604 (a) (1) and 5681 (c).

Appellant has filed a separate appeal from the judgment of the District Court denying a new trial on grounds of newly discovered evidence. At the trial federal alcohol tax investigators testified that on November 6 and November 8, 1964, while walking on the sidewalk in front of the premises at 289 Josephine Street, Detroit, Michigan, they smelled odors of fermenting mash emanating from those premises. One of the investigators testified that on the day the search warrant was executed, November 10, 1964, he detected the odor of fermenting whiskey mash coming from the direction of the premises.

The newly discovered evidence introduced by appellant at the evidentiary hearing on the motion for a new trial was principally to the effect that at the times and on the dates involved, the wind was blowing in the opposite direction from the sidewalk where the alcohol tax investigators were located and the investigators could not have smelled the odor of fermenting mash from the five illicit stills operated in the attic of the premises. Upon the basis of this testimony appellant contends that the District Judge should have been reasonably well satisfied that the testi-

mony given by three material witnesses for the Government was false and that, if the jury could have heard the testimony concerning the direction the wind was blowing, they might have reached a different conclusion.

At the end of the evidentiary hearing the District Judge commented from the bench: "I will tell you frankly, gentlemen, that this is about the least persuasive of anything I have ever heard from this bench."

Upon consideration of the briefs and appendix of appellant and after reading the entire transcript of the proceedings on the motion for a new trial on grounds of newly discovered evidence, the Court holds that the record conclusively demonstrates no abuse of discretion by the District Judge in denying the motion for a new trial.

The appeal is dismissed as frivolous and entirely without merit. Rule 9, Supplementary Rules of this Court.

APPENDIX C.

Order Dismissing Appeal.

(Entered September 17, 1968.)

It is ordered that this appeal be and it is dismissed pursuant to opinion this day filed.

Entered by order of the Court.

CARL W. REUSS,
Clerk.

APPENDIX D.

Rule 33 of the Federal Rules of Criminal Procedure.

"The court on motion of a defendant may grant a new trial to him if required in the interest of justice. If trial was by the court without a jury the court on motion of a defendant for a new trial may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 7 days after verdict or finding of guilty or within such further time as the court may fix during the 7-day period."

APPENDIX E.

Weather Bureau Report.

UNITED STATES DEPARTMENT OF COMMERCE
WEATHER BUREAU

Station Weather Bureau, Detroit Date October 4, 1967

I hereby certify that records of the U. S. Weather Bureau indicate at the Detroit City Airport Observatory the wind records were:

November 6, 1964	8 p.m.	SW	11 miles per hour
November 6, 1964	9 p.m.	SW	8 miles per hour
November 6, 1964	10 p.m.	SW	8 miles per hour
November 6, 1964	11 p.m.	WSW	13 miles per hour
November 8, 1964	8 p.m.	WSW	8 miles per hour

FLOYD H. PEARSON
(Acting) *Meteorologist in Charge.*